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October 13, 2015

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Written *Ex Parte* Communication, MB Docket No. 10-71

Dear Ms. Dortch:

This letter is being filed in the above-referenced proceeding on behalf of the State Broadcasters Associations named at the end of this letter (collectively, the “State Associations”). The State Associations are filing this letter to oppose the Commission’s proposal to eliminate the network non-duplication and syndicated exclusivity rules (the “Exclusivity Rules”), and to respond to the September 22, 2015 blog post by the Chief of the Media Bureau, Bill Lake, which champions the Commission’s proposal (“Blog Post”).¹

INTRODUCTION

Although broadcasters typically welcome Commission review of outdated rules, the Exclusivity Rules, while certainly well-established, are far from outdated. Any proposal to eliminate rules so integral to the health of broadcast localism cannot simply be viewed in the abstract, but instead must acknowledge the real-world consequences and harms that would ensue. The State Associations are therefore disappointed to see the FCC, via the Blog Post, merely repeat the same empty rationale for eliminating the Exclusivity Rules as the FCC’s Further Notice of

¹ Official FCC Blog, Bill Lake, *The Time Has Come to End Outdated Broadcasting Exclusivity Rules* (Sept. 22, 2015), <https://www.fcc.gov/blog/time-has-come-end-outdated-broadcasting-exclusivity-rules> (last visited Oct. 2, 2015).

Proposed Rulemaking (“FNPRM”)² offered—that the rules are outdated. There is an important distinction, however, between “outdated” and what the Exclusivity Rules actually are—tried and true. “Outdated” suggests that the Exclusivity Rules have ceased to have their original utility, but there is not an iota of evidence in the record to support that conclusion. They serve the same purpose today as when they were adopted, that purpose is no less vital, and mere repetition of the word “outdated” cannot change that fundamental fact.

Many commenters in this proceeding have focused on the integral connection between the Exclusivity Rules and the continued availability of the Compulsory License, and they are correct that the two mechanisms are inextricably linked. The Blog Post seeks to deny that fact, and is therefore unpersuasive. However, that point has been well covered in the record by others, and the State Associations therefore wish to focus herein on a different unsupported assertion made in the FNPRM and Blog Post—that the issues the FCC seeks to create by eliminating the Exclusivity Rules can be addressed solely through contracts and court litigation.

Setting aside that it is not in the public interest to burden already overburdened courts with more litigation, stations and MVPDs with more costs, and the public with having to ultimately pay those costs (whether in lost local service or through higher prices on advertised products and MVPD subscriptions), contracts cannot accomplish the miraculous results the FNPRM and Blog Post attribute to them. Indeed, as detailed below, the Exclusivity Rules remain necessary precisely because no private contractual regime can even begin to address the issues created by Congress via the Compulsory License.

This is not a point of debate, but simple legal fact. That is why there is nothing in the record actually seeking to demonstrate how contracts can successfully, much less efficiently, address the program exclusivity issues that the Exclusivity Rules manage so elegantly. Instead, the FNPRM and Blog Post merely assume that they can with no evidence to support that assumption.

I. The Exclusivity Rules Are Hardly Outdated, and in Fact, More Vital Than Ever.

The State Associations fully agree that all rules should be subject to regular review to ensure they continue to serve the public interest, and the Exclusivity Rules should not be exempt from such a review. However, even a cursory examination reveals that these rules continue to serve an important purpose and in fact have become more important as competing programming sources increasingly rely on their own program exclusivity to compete for audiences and advertisers.

² *Amendment of the Commission’s Rule Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 03351 (2014).

That a rule is old of course has no bearing on its efficacy, and the FNPRM implicitly acknowledges the validity of the rules' objectives by suggesting that the reason to eliminate them is not that the rules themselves are flawed in any way, but that their objectives can be achieved via private contracts enforced in the courts. As discussed below, that is a factually incorrect assumption.

II. There Is No Contractual Alternative to the Exclusivity Rules.

Note that the above statement is not a qualified one. The problem is not just that enforcing contractual exclusivity is more costly, less efficient, and more time-consuming—it is all of those things—but that enforcing a station's program exclusivity against cable signal importation contractually is simply not possible.

As a preliminary matter, even accepting purely for purposes of discussion that private contracts could be an alternative, the Exclusivity Rules should still be retained. Eliminating a uniform national exclusivity standard governed by a single expert agency that has never had to expend significant resources enforcing it, and replacing it with a miasma of varying exclusivity zones and contractual clauses, enforced at great expense in a variety of courts inexperienced with the highly complex interplay of Copyright Law and TV Retransmission Consent Law, makes little sense. It's not just that conflicting rulings and extended appeals would occur (they would); it is that rulings from different courts based on different contract clauses would provide little useful precedent, resulting in yet more litigation, forum shopping, and uncertainty.

Such an approach is not just inefficient and harmful to the litigants; it is an inefficient use of government—particularly overburdened judicial—resources. Given that the FCC is expending more of its resources on conducting this rulemaking than it has likely expended in a decade of enforcing the Exclusivity Rules,³ burdening courts, TV stations, and cable operators with the cost of building a new body of precedent in what will be a novel area of law is inefficient in the extreme for government, and a diversion of station resources from serving the public. The cost of such inefficient litigation can only ultimately come from one source: the public.

In any event, such litigation cannot achieve through alternate means the objective of the Exclusivity Rules. TV stations cannot contractually block importation of a distant TV station.

A TV station's contract with a network or other program supplier providing for local exclusivity provides the station with enforcement rights only against that network. No other entity is a party to that contract and therefore no other entity is bound by its terms. As a result, if a station were to bring a legal action against its network, it would need to allege that the network breached the contract by entering into an agreement that conflicts with the station's geographic exclusivity. In the

³ See FNPRM ¶ 66 n.249.

context of a violation of the Exclusivity Rules, no such breach has occurred; the network's contract with the distant station being imported correctly limits the distant station to carriage of the network's programming only in that distant market. The local TV station therefore has no legal remedy available against its network, much less against the distant station being imported or the cable system importing it.

In most cases, that will be the end of it, with the local station having no contractual right a court could recognize to prevent importation of another station duplicating its exclusive programming. But let's assume for the moment that the network, even though it is not in breach, decides to enter the fray to assist the local station in protecting its exclusivity. The network brings pressure to bear upon the distant station, including a legal action asserting that the distant affiliate breached its network contract by signing a retransmission agreement that doesn't explicitly limit retransmission to that station's DMA. The network can arguably win a damages award for breach of contract against the distant station, but that does nothing for the local station being imported upon, and certainly does not replicate in any way the protection currently provided by the Exclusivity Rules. Meanwhile, the cable system suffers no consequences for the damages its strategy is causing to the local station, the distant station, the program supplier, and the public in both markets.

So, even with the network's involvement, contracts provide the local station with no protection against cable importation of the network programming. But let's assume the network is so incensed that it puts immense business pressure on the distant station, or in fact sues the distant station for injunctive relief. In either case, the network demands that the distant station prevent the cable system from retransmitting that station's signal into another market. Even if an injunction were issued against the distant station, however (which is doubtful given that it would solve a breach of the network agreement by requiring a breach of the retransmission agreement), the distant station has no method of stopping the retransmission. That is because the agreement regarding retransmission *of its signal* is enforceable even though the station doesn't have the rights to the programming *in* that signal outside of its local area.⁴

As a legal matter, the distant station therefore has no power to prevent the retransmission of its signal once it has signed the retransmission agreement. As a practical matter, there is no physical way of stopping the retransmission either, because the distant station has no way of cutting off its signal to the cable operator short of going off the air entirely (and depriving its home market of service). The cable operator can just pick the signal up over-the-air. The result is that the die was cast the moment the distant station improvidently signed the retransmission agreement. At that point, there is no contractual way (or even a physical way) of preventing retransmission of the signal and its programming into another affiliate's market.

⁴ See *Nexstar Broadcasting, Inc. v. Time Warner Cable, Inc.*, 524 Fed. Appx. 977, 978 n.1 (5th Cir., 2013).

So even if a local station could use contracts and courts to compel cooperation of its network/program supplier AND the distant station (which of course it can't), or if the network and distant station wanted to fully cooperate with the local station, they could still not prevent the exportation of the distant station's signal.⁵

We understand that some parties have suggested that importation could be prevented by a local station on the theory that the local station is a third-party beneficiary of the distant station's network affiliate contract. That theory fails for several reasons. First, third-party beneficiary law provides a right of enforcement only to intentional third-party beneficiaries, not incidental third-party beneficiaries.⁶ As a result, it is not even possible to seek third party relief unless the network affiliation contract specifically states that other affiliates are the intended beneficiaries of that contract. Lacking such a provision, the local station has no enforceable third-party rights against the distant station, leaving the local station with no way of preventing an MVPD from importing the distant station.

Even if, however, all programming agreements were modified to specifically name other stations distributing the same programming as third-party beneficiaries of the program contract, that accomplishes nothing to prevent the distant signal importation. As noted above, once the distant station signs a retransmission agreement that doesn't specifically prohibit retransmission outside of the station's DMA, even the network is helpless to prevent such importation. A third-party beneficiary of that contract can fare no better.

Given that there would be no legal or physical way to prevent retransmission of the distant station's signal, the only possible solution for preventing retransmission of the exclusive programming *in* that signal is for the network/program supplier to declare breach, terminate the program contract (something a third-party beneficiary could not do), and thereby deprive the station, the retransmitting cable system, and the entirety of the distant station's market of that programming—a drastic and disruptive solution that protects program exclusivity in one market by depriving another market of that programming entirely—hardly a good result for the public.

⁵ See *id.* (denying Nexstar's motion for preliminary injunction seeking to prevent Time Warner's importation of Nexstar's signals into a distant market where the affiliation agreement prohibited distant retransmission and such importation infringed on the local affiliate's exclusivity).

⁶ See, e.g., *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 683 (2003) (J. Scalia, concurring) ("In contract law, a third party to the contract . . . may only sue for breach if he is the 'intended beneficiary' of the contract"), citing Restatement (Second) of Contracts § 304 (1979) ("A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty"); see also Comment to Restatement (Second) of Contracts § 302 (1981) ("This Section distinguishes an 'intended' beneficiary, who acquires a right by virtue of a promise, from an 'incidental' beneficiary, who does not.").

Accordingly, the FCC should retain its allegedly “outdated” Exclusivity Rules and avoid all of this.

III. Premising Elimination of the Exclusivity Rules on the Assumption That No TV Station Will Grant Retransmission Rights Outside of Its DMA Is Misguided.

The FNPRM states:

We further note that, given the prohibition on unauthorized retransmission of broadcast stations, a distant station would have to agree to be imported in such circumstances and that contractual arrangements between networks and their affiliates may bar a broadcaster from agreeing to the importation of its distant signal.⁷

The Blog Post not only makes this same assertion,⁸ but relies upon its accuracy as the basis for claiming that the link between the Compulsory License and the need for the Exclusivity Rules has been broken. As discussed above, however, whether a station’s network affiliation agreement bars exportation of the programming to other markets is irrelevant, and has no bearing on the legal inability of a local station to block such importation in the absence of the Exclusivity Rules.

The assertion that importation is unlikely because “a distant station would have to agree to be imported” is also flawed. First, the contractual default goes the other direction. A retransmission agreement isn’t limited to the local DMA in the absence of language specifically extending retransmission rights to other DMAs; a retransmission agreement is geographically unlimited unless language is specifically inserted restricting the geographic extent of retransmission consent. So, for example, a TV station signing a retransmission agreement that states “Station hereby grants retransmission consent for Cable Operator to retransmit the Station on its systems” has just granted nationwide retransmission rights.⁹ In the absence of Exclusivity Rules, that station can now be imported into every DMA in the country by that cable operator, and no local station could prevent it. MVPDs are well aware of this, and present stations with contracts containing just such language (and more camouflaged versions of it) to see if the broadcaster catches it.

⁷ FNPRM ¶ 58.

⁸ The Blog Post states: “Under our current retransmission consent regime, a distant station must give its consent before its signal may be imported into another station’s local market. And, in practice, network affiliation and syndication agreements typically prohibit broadcast stations from granting MVPDs retransmission consent for out-of-market carriage of their signals. Networks, syndicators, and broadcast stations that choose to create exclusive distribution rights may effectively safeguard those rights through privately negotiated affiliation and syndication agreements.” Blog Post ¶ 7.

⁹ See, e.g., *Nexstar*, 524 Fed. Appx. at 979-80 (“The RCA broadly defines ‘System’ to mean all Time Warner Systems—it does not limit the term to only those Time Warner Systems servicing the relevant local television markets”).

Second, it only takes a single station in the entire United States to wipe out the program exclusivity of every other station carrying the same programming in the absence of the Exclusivity Rules. Would any other business be satisfied with local exclusivity over a product line that is only effective until someone else unilaterally decides to sell it in your market? There is a word for such exclusivity; that word is “worthless”.

Third, a great many stations negotiate and sign retransmission agreements without counsel, and a great many more do so without counsel experienced in retransmission contracts. As a result, the question is not whether one station will sign an open-ended retransmission agreement, but how many stations will do so.

Fourth, even if every station in the country was very careful about the language in its retransmission agreements, an MVPD just has to separate one small station from the herd by demanding that contract language and blacking out the station until it has no choice but to buckle. The Commission could unrealistically claim that such a station should file a Good Faith complaint with the FCC, but the economic reality is that if such a station can’t afford the legal costs and advertising losses from even a short blackout by the MVPD, it certainly can’t withstand the cost and delay of a Good Faith violation proceeding. If only one out of every 200 TV stations buckles under such pressure, the MVPD has succeeded in obtaining its nationwide source of programming to export to other markets.

Finally, it has been suggested that perhaps a station’s network could police all affiliates’ retransmission agreements to ensure no affiliate accepts terms that could violate the network’s affiliation contract. However, the confidentiality clauses demanded by MVPDs in retransmission agreements prohibit disclosure of any terms of the agreement, much less review by a third party, and MVPDs are increasingly asking for confidentiality clauses that specifically name the network as a party prohibited from being given access to any terms of the retransmission agreement. Regardless, such an approach would be extremely impractical (“I can’t sign this agreement until I hear back from my network and they say it’s okay”), and is presumably a *per se* violation of the FCC’s Good Faith rule since a station is required to “designate a representative with authority to make binding representations on retransmission consent”¹⁰ and can’t do so if the agreement has to be reviewed and approved by a third party before any binding commitment can be made.

IV. The Exclusivity Rules Should Be Retained.

There can be no doubt that the Exclusivity Rules continue to serve an important purpose in preserving local broadcast outlets and promoting local service that no distant stations can provide. The FNPRM and Blog Post effectively concede this, focusing instead on whether these same results could be achieved through private contracts. They cannot.

¹⁰ 47 C.F.R. § 76.65(b)(1)(ii).

Importation of distant signals, and even the threat of importation, will harm localism. When a local station's audience is split between that station and an imported station carrying the same programming, viewers are confused, local businesses are harmed, and local station ratings and revenue are reduced, resulting in diminished funds for local news and other programming. Asking stations to expend these already reduced resources in the courts trying to stop such importation only further diverts station resources from service to the public.

Retaining the Exclusivity Rules elegantly eliminates all of these problems while also conserving Commission resources, as the resources expended on enforcing the Exclusivity Rules are paltry compared to those the Commission would need to expend processing the resulting Good Faith violation complaints.

Why? Because the very definition of bad faith is an MVPD claiming it has obtained the right to export programming to other markets from a TV station that it knows full well never had those rights to give to it in the first place. MVPDs complaining about the Exclusivity Rules are akin to the person who claims he bought the Brooklyn Bridge from a street vendor and is now incensed that the government refuses to let him charge a toll for crossing "his" bridge.

CONCLUSION

The State Associations urge the Commission, for the reasons set forth herein, to maintain the Exclusivity Rules that have worked so well these many years.

Respectfully submitted,

By: _____/s/_____
Richard R. Zaragoza
Scott R. Flick
Jessica T. Nyman

Counsel in this matter for the following State Broadcasters Associations:

Alabama Broadcasters Association, Alaska Broadcasters Association, Arizona Broadcasters Association, Arkansas Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Florida Association of Broadcasters, Georgia Association of Broadcasters, Hawaii Association of Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, MD/DC/DE Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters

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Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Jersey Broadcasters Association, New Mexico Broadcasters Association, The New York State Broadcasters Association, Inc., North Carolina Association of Broadcasters, North Dakota Broadcasters Association, Ohio Association of Broadcasters, Oklahoma Association of Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters, Rhode Island Broadcasters Association, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Virginia Association of Broadcasters, Washington State Association of Broadcasters, West Virginia Broadcasters Association, Wisconsin Broadcasters Association, and Wyoming Association of Broadcasters